



Decision Notice 109/2022

Complaint made to the SPSO

Applicant: the Applicant

Authority: Fife Council

Case Ref: 202101198

Summary

The Applicant asked the Authority for information it held in relation to a planning complaint he had made about the Authority to the SPSO. The Authority disclosed information, but the Applicant considered further information was held. During the investigation, the Authority disclosed additional information to the Applicant. The Commissioner was satisfied, by the end of the investigation, that the Authority had disclosed the information it held and which fell within the scope of the request. By failing to disclose all information in response to the request, the Authority failed to comply with FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. The Applicant was unhappy with the way the Authority dealt with his complaints about a planning application and referred the matter to the Scottish Public Services Ombudsman (the SPSO). The SPSO published its decision on one of his complaints in November 2020.
2. On 15 November 2020, the Applicant made a request for information to the Authority in relation to the SPSO decision. He asked for all:

- Written documents
 - Electronic documents - all emails both internal and external to the Authority
 - Telephone transcripts - notes from any calls made and or received
 - Case worker notes and or jottings, including blotter-type notes
 - Minutes and/or notes held or taken during any discussions(s) regarding this case at all and every location of the Authority.
3. The Authority responded on 16 November 2020, informing the Applicant that it was treating his request as a subject access request under Data Protection legislation.
 4. Later the same day, the Applicant informed the Authority that he was not seeking his own personal data.
 5. On 16 December 2020, the Authority issued a response to the Applicant under Data Protection legislation, disclosing the information he had requested, including all electronic documents, emails, minutes of meetings and correspondence, and confirmed that it did not hold any information on telephone transcripts.
 6. On 24 December 2020, the Applicant wrote to the Authority, requesting a review of its response. He stated he was dissatisfied with the response, as documents were missing from his request, documents had been duplicated and some did not appear to relate to his request. He described in detail his dissatisfaction with pages of information that had been disclosed.
 7. Following intervention of the Commissioner, the Authority notified the Applicant of the outcome of its review on 10 September 2021. It acknowledged that it had not issued a response under FOISA, provided copies of further documents it had identified, apologised for the disorganised nature of the information disclosed and confirmed no further information was held.
 8. On 21 September 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of Authority's review because he considered further information was held, that had not been disclosed.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 1 October 2021, the Authority was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the information that had been disclosed to the Applicant, and the searches that had been undertaken.
12. The Applicant was asked for, and provided, his comments on why he did not consider all of the information he had requested had been disclosed.

13. The Authority provided a copy of the information disclosed to the Applicant. The investigating officer entered into dialogue with the Authority, as to whether all of the information requested had been provided. On 5 May 2022, the Authority disclosed further information to the Applicant, together with an explanation why it was satisfied that all relevant information had been identified and provided.
14. The Applicant and the Authority entered discussions as to whether all of the information requested had been disclosed.
15. On 23 May 2022, the Authority provided submissions as to the searches it had conducted for the information requested.
16. On 27 May 2022 the Authority disclosed a further email to the Applicant and apologised for not providing it earlier..

Commissioner's analysis and findings

17. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Does the Authority hold further information?

18. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
19. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4).
20. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions

21. The Commissioner has taken account of the arguments in both the Applicant's requirement for review and his application, in which he provides detailed reasons why he considers the Authority should hold further information falling within the scope of his request.
22. The Applicant stated that he had not been provided with:
 - (i) An Authority employee's reassessment report;
 - (ii) Risk assessment for the light test and associated details as to how it was worked out;
 - (iii) Correspondence with an MSP;
 - (iv) Internal Authority correspondence;

- (v) Correspondence with the Community Council.

The Authority's submissions

23. When the Authority provided the Applicant with information during the investigation, it responded to matters raised by the Applicant, confirming that further information was not held.
24. The Authority submitted that it had searched the relevant locations for the requested information, which included:
- Novel Drives – information had been transferred to SharePoint, and it initially it was not considered possible to access information in these drives. During the investigation, it was discovered that the files could still be searched and information downloaded;
 - SharePoint – Planning had moved all their case files from Novel to SharePoint for storage;
 - Outlook – staff identified all searched emails for complaint number, SPSO number and the Applicant's name.
25. The Authority submitted that these were the only relevant locations, as the service holding the data stored information in a service shared file. This was previously Novel, but had since transferred to SharePoint. All relevant staff who were involved in the SPSO correspondence also searched their emails to identify any additional information that fell within scope of the request.
26. The Authority provided details of the individuals that had searched the records, explaining that they had remits which included SPSO complaints. One named individual was the central contact for guidance and advice within the Authority for complaints and the SPSO contact for the Authority. Two other named individuals were Service Mangers who were responsible for complaints and SPSO investigations for the Planning Service. These managers both reported to another named individual, whose records were also searched.
27. The Authority also provided evidence to substantiate its position that relevant searches had been conducted, and that minimal information had been kept about the investigation of the complaint by the SPSO. The Authority also confirmed that as one individual had left its employment in 2021, it could no longer access this individual's email account (which had been deleted) to search again for any further information.
28. The Council confirmed that the relevant staff had duplicated checks for the requested information and the only other information that had been identified was an email, which had been disclosed to the Applicant.

The Commissioner's conclusions

29. The Commissioner has considered the correspondence, and information disclosed to the Applicant during the investigation, which was organised into date order. He notes that there is a clear structure to the correspondence, from the date when the SPSO contacted the Authority, to when the SPSO issued its decision.
30. The Commissioner notes that the Applicant considers that there have been other actions, and other individuals and organisations would have been contacted to obtain input about his dissatisfaction with the planning application.

31. On the basis of information disclosed, and all relevant submissions and the terms of the request, the Commissioner is satisfied that, by the end of the investigation, the Authority had taken adequate, proportionate steps in the circumstances to establish whether it held any further information that fell within the scope of the request. However, it is apparent from information disclosed during the investigation that it did not achieve this in dealing with the Applicant's request or requirement for review.
32. In reaching a decision on the application, the Commissioner must restrict himself to the terms of the request and, if information was not provided or received in relation to the particular complaint, he has no remit and cannot comment whether the Authority should hold further information.
33. He has considered the reasons provided by the Authority which explain why no further information is held, and why information identified by the Applicant as missing is not held by the Authority.
34. The Commissioner is satisfied that the searches described by the Authority would have been capable of identifying any further information relevant to the request. The Commissioner is therefore satisfied, on the balance of probabilities, that the Authority does not hold any further information falling within the scope of the request.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by the end of the investigation, the Authority had provided the Applicant with all information held and falling in scope of the request, and so complied with Part 1.

However, by not disclosing all of the relevant information to the Applicant until after the investigation had commenced, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA.

Given that all relevant information has now been disclosed, the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

24 October 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
 - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).

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